IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO. 42 OF 2001.

Shri Dominic J. Mascarenhas,
r/o Nuvem, Murda Grande,
H.No. 31, Salcete Goa. ... Appellant.

Versus

1. Mr. Morogan V. Travasso,
   Partner, M/s. Prime
   Realtors, 'Vikrant'
   F-49, 1st Floor,
   Malabhat, Margao, presently
   r/o Tilamol, Quepem.
2. Mr. Pradeep Prabhakar Keni,
   Partner, M/s. Prime Realtors
   'Vikrant' F-49, 1st Floor,
   Malabhat, Margao, presently
   r/o G-1, Sareena Co-operative
   Housing Society, Near TVS
   Show-Room, St. Joaquim Road,
   Borda, Margao. ... Respondents.

Mr. J. Godinho, Advocate for the Appellant.

Mr. A.F. Diniz, Advocate for the Respondents.

Coram : P.V. HARDAS, J.

Date : 13th June 2003.

ORAL JUDGMENT.

The appellant/original complainant being aggrieved by the Judgment of the learned Judicial Magistrate, First Class, Margao, dated 26th April 2001, in Criminal Case No. 452/N/1997/D, acquitting the respondents/accused for an offence punishable under Section 138 of the Negotiable Instruments Act, has filed the present appeal. The facts in brief as are necessary for the decision of the appeal are set out hereunder:-

2. A complaint, Exhibit 1, came to be filed by

the present appellant against the respondents on 16th October 1997 for an offence punishable under Section 138 of the Negotiable Instruments Act. After recording the verification statement of the appellant/complainant, the learned trial Court ordered issuance of summons to the respondents/accused. Vide Exhibit 14, the substance of accusation was explained to the accused. The respondents/accused pleaded not guilty and claimed to be tried.

3. The complainant examined himself as P.W.1. He stated that he knows both the accused and the accused are partners of M/s. Prime Realtors, a partnership firm. He had entered into an agreement with both the accused for the sale of his flat at Margao, bearing No. S-4, on the second floor of the building known as 'Vaishali Apartments'. He further stated that the accused had agreed to pay him Rs. 2,75,000/- as consideration for the sale of the said flat. The terms of payment had been agreed between the parties. Rs. 25,000/- had been paid by the accused by demand draft and a post-dated cheque for 1 lakh was issued by the accused to the complainant drawn on the Madgaum Urban Co-operative Bank, Margao. Another post-dated cheque, dated 10th December 1997, was also given by the accused for Rs. 1,50,000/- drawn on the Madgaum Urban Co-operative Bank, Margao. The complainant has further

stated that the cheque dated 10th May 1997 for Rs. 1 lakh was deposited by him in the Bank where he has his account. The said cheque was returned by the Bank of the accused on account of insufficiency of funds. The said cheque is at Exhibit P.W.1/A. A memo of the Margao Urban Co-operative Bank returning the cheque for insufficiency of funds is at Exhibit P.W.1/B. The complainant thus, through his advocate, issued notices to both the accused by registered post with Acknowledgement Due. The accused no. 2 was duly served with the notice but the notice of accused no. 1 was returned to the complainant with an endorsement 'unclaimed'. The office copy of the notice, the postal acknowledgement and the unclaimed envelope containing the notice are at Exhibit P.W.1/C Colly. By reply at Exhibit P.W.1/D, the accused no. 2, through his advocate, intimated the complainant that accused no. 2 was desirous of settling the matter. In the said reply, the accused no. 2 had also requested for some time for paying the dues.

4. Since despite receipt of the notice, no payment was forthcoming, the complainant filed a complaint before the Judicial Magistrate. The complainant has stated that on 23rd November 1999, after filing of the complaint, he was paid an amount of Rs. 10,000/- by the accused. In the cross-examination of

the complainant it was suggested to him, which was denied by him, that the entire amount of Rs. 2,75,000/- had been paid by the accused in June 1998. He also denied the suggestion that since he had not executed any receipts in token of having received the payment, he had filed the complaint. The complainant in support of his case also examined P.W.2 Rajan Keni, an employee of the Madgaum Urban Co-operative Bank, Margao Main Branch. He has proved that the cheque was returned because of insufficiency of funds in the account of the accused. This witness has not been cross-examined on behalf of the accused.

5. In the statement recorded under Section 313 of the Criminal Procedure Code, both the accused have admitted the entire case of the complainant. In response to question no. 7 that the notice issued to accused no. 1 had been returned as unclaimed, the accused no. 1 answered that question in the affirmative. The accused have also admitted issuing the cheque for Rs. 1 lakh to the complainant. In response to question no. 12 that the entire amount due had not been paid to the complainant, the accused have answered in the affirmative.

6. In support of their defence the accused no. 1 examined himself as D.W.1 In his evidence he has stated

that the first instalment of Rs. 25,000/-, second instalment of Rs. 1 lakh and third instalment of Rs. 25,000/-, fourth instalment of Rs. 25,000/-, fifth instalment of Rs. 50,000/- and sixth instalment of Rs. 10,000/- were paid to the complainant. He has admitted that the balance payment was Rs. 40,000/- and the said balance was not paid as the roof slab of the flat was damaged and was not in a proper condition. In the cross-examination he has admitted that no receipts evidencing the payments of the instalments other than the instalments which the complainant has stated to have received were obtained. He has also stated that the statement made by him under Section 313 of Criminal Procedure Code that the entire amount had not been paid to the complainant was not correct.

7. The accused also examined one Pradeep Keni D.W.2 as a witness in their defence. D.W.2 Pradeep states that he knows the complainant and has stated that an amount of Rs. 1,68,504 has been paid to the complainant as against the sale consideration of Rs. 2,75,000/-. In the cross-examination he has agreed that the cheques have bounced for insufficiency of funds and despite receipt of the notices, no payments have been made. It is an admitted fact that no receipts for the alleged payments have been obtained from the complainant. It appears that he is an obliging witness,

who has stepped into the witness box to support the accused for proving their defence. No reliance can be placed on such a witness. The defence of the accused through their evidence seems to be an afterthought, particularly in view of their statements given under Section 313 Criminal Procedure Code.

8. The learned trial Court acquitted the accused principally by relying on a decision of this Court in **A. Chinnaswami v. M/s. Bilakchand Gyanchand Company,** 1998 (3) Crimes 395. In the aforesaid authority, this Court had taken the view that issuance of notice of bouncing of cheque to individual who had signed the cheque without notice to the company was not valid notice under Section 138 of the Negotiable Instruments Act. It appears that it was not brought to the notice of the learned trial Court that the said Judgment had been reversed by the Supreme Court. The Supreme Court in **M/s. Bilakchand Gyanchand Co. v. A. Chinnaswami,** A.I.R. 1999 S.C. 2182 quashed and set aside the Judgment of this Court in A. Chinnaswami v. M/s. Bilakchand Gyanchand Company (supra). The learned trial Court relying on the aforesaid Judgment and other authorities proceeded to acquit the accused on the ground that admittedly the accused were partners of a partnership firm and the partnership firm had not been issued with a notice as is required under the Negotiable

Instruments Act. The learned trial Court further held that the firm had not been impleaded as party to the proceedings and, therefore, acquitted the respondents/accused.

9. Mr. Godinho on behalf of the appellant/complainant has invited my attention to the Judgment of the Supreme Court in **T. Stanes & Co. Ltd. v. A. Jaffarullah,** (2001) 10 S.C.C. 78. The Supreme Court in the aforesaid authority, referring to the earlier decision of the Supreme Court in **Anil Hada v. Indian Acrylic Ltd.,** (2000) 1 S.C.C. 1 held that the provisions do not contain a condition that prosecution of the company is a sine quo non for prosecution of other persons who fall within the second and the third categories mentioned therein. The Supreme Court further held that even if the company is not prosecuted for one or the other reason, the other prosecuted person cannot, on that score alone, escape from the penal liability created through the legal fiction envisaged in Section 141 of the Act.

10. The Supreme Court in **R. Rajagopal v. S.S. Venkat,** (2001) 10 S.C.C. 91 quashed and set aside the order of the High Court which had quashed the complaint filed only against the partnership firm without impleading the partnership firm as an accused.

11. In view of this settled position in law that the prosecution cannot be jettisoned on the ground either that the partnership firm was not served with a notice or that the firm had not been impleaded as an accused, the Judgment of the learned trial Court acquitting the respondent/accused on the ground that the notice has not been served on the partnership firm and the firm not being made an accused cannot be sustained. Mr. Diniz, learned counsel appearing on behalf of the accused, has tried to support the Judgment of the trial Court by urging that issuance of notice to the firm was mandatory before the complaint was filed by the complainant/partners. According to the learned counsel, the firm was a necessary party, in the absence of which the complaint was rightly dismissed. The submissions of the learned counsel for the respondents/accused is devoid of any merit and is squarely answered by the decisions referred to above.

12. Therefore, according to me, the Judgment of the learned trial Court is wholly unsustainable in law.

13. Mr. Diniz also heavily relied on the Judgment of the Supreme Court in **Smt. Katta Sujatha v. Fertilizers & Chemicals Travancore Ltd. and another,** (2002) 7 S.C.C. 655, to urge before me that in the complaint there are no averments that the accused are

participating in the day to day functioning of the firm so as to make them liable. The cheques are admittedly signed by both the accused on behalf of M/s. Prime Realtors. This as a defence had not been set up before the learned trial Court also. Apart from that, since the cheque was signed by both the accused, there is no force in the submission of the learned counsel for the accused that there are no averments in the complaint.

14. In my considered opinion, therefore, the Judgment of the learned trial Court acquitting the respondents/accused is wholly unsustainable and deserves to be quashed and set aside.

15. Since the respondents/accused are absent today, the matter is adjourned to next week for hearing them on sentence.

(P.V. HARDAS)
JUDGE.

ed's.

Date : 19th June 2003.

ORAL ORDER.

16. The respondents are present in Court pursuant to the bailable warrant issued by this Court. The

respondents/accused are heard on the point of sentence. The respondents/accused submit that at present they are going through a very bad patch in their business as all the construction activities have come to a standstill. They further submit that they have suffered losses in their business and, therefore, were not in a position to pay the amount of the cheque.

17. After hearing the learned counsel for the appellant and the respondents/accused, in my considered opinion the ends of justice would be met by passing the following sentence:-

18. The Appeal is allowed. The Judgment, dated 26th April 2001, passed by the Judicial Magistrate, First Class, Margao, is hereby quashed and set aside and the respondents/accused are convicted for an offence punishable under Section 138 of the Negotiable Instruments Act and are sentenced to undergo simple imprisonment till rising of the Court and to pay to the appellant an amount of Rs. 1 lakh as compensation under Section 357 of the Code of Criminal Procedure. In view of the compensation awarded to the respondents/accused, no separate sentence of fine is passed.

(P.V. HARDAS)
ed's JUDGE.